*Samuel L. Fowler, Plaintiff in error, *v.* Harris Brantly and others, Defendants in error.

Customs of banks.—Over-due paper.

Action on a promissory note for $2000, made for the purpose of being discounted at the Branch Bank at Mobile, payable to the cashier of the bank or bearer, and upon which was written an order to credit the person to whom the note was sent, to be by him offered for discount to the bank, for the use of the makers, the order being signed by all the makers of the note. The bank refused to discount the note, and it was marked with a pencil mark, in the manner in which notes are marked by the bank which are offered for discount; the agent of the makers to whom the note was intrusted to be offered for discount, put it into circulation, after indorsing it; having disposed of it for $1200, for his own benefit, without the knowledge of the makers; and communicated to the purchaser of the note, that it had been offered for discount, and rejected by the bank; the note was afterwards given to other persons in part payment of a previous debt, and credit for the amount was given in the account with their debtors. The form of the note was that required by the bank when notes are discounted, and had not been used, before it had been so required by the bank. The circuit court instructed the jury that the plaintiff was not entitled to recover from the makers of the note: *Held*, that the instruction was correct.

The known custom of a bank, and its ordinary modes of transacting business, including the prescribed forms of notes offered for discount, enter into the contract of those giving notes for the purpose of having them discounted at such bank; and the parties to the note must be understood as having agreed to govern themselves by such customs and modes of doing business; and this, whether they had actual knowledge of them or not; it was the especial duty of all those dealing with the note to ascertain them, if unknown. This is the established doctrine of the supreme court, as laid down in Renner *v.* Bank of Columbia, 9 Wheat. 581; in Mills *v.* Bank of the United States, 11 Ibid. 431; and in Bank of Washington *v.* Triplett, 1 Pet. 32.

A note over-due, or a bill dishonored, is a circumstance of suspicion to put those dealing for it afterwards on their guard; in whose hands it is open to the same defences it was in the hands of the holder, when it fell due. After maturity, such paper cannot be negotiated.[1]

Error to the Circuit Court for the Southern District of Alabama. In the circuit court of Alabama, an action was instituted on a promissory note, by the plaintiff in error, against the defendants; and a verdict and judgment were entered for the defendants. The plaintiff took exception to the charge of the court, and prosecuted this writ of error. The facts of the case, and the matters which were the subjects of the exceptions taken to the rulings of the court, are fully stated in the opinion of the court.

The case was argued, at January term 1839, by *Ogden*, for the plaintiff in error; and by *Van de Graff*, for the defendants. It was held under advisement, for a reference to a statute for Alabama, until this term.

Catron, Justice, delivered the opinion of the court.—This is an action of *assumpsit*, by the assignee of a note against *the makers. The [*319 question of law arising in this cause depend on the construction of a note of hand, in the following words:

[1] See Goodman *v.* Simonds, 20 How. 366; Bank of Pittsburgh *v.* Neal, 22 Id. 108; Angle *v.* Ins. Co., 92 U. S. 342; Collins *v.* Gilbert, 94 Id. 758; Bruen *v.* Spofford, 95 Id. 483; Parsons *v.* Jackson, 99 Id. 441; Swift *v.* Smith, 102 Id. 444–5.

"Selma, Dallas County, Alabama, March 1st, 1836.

"Eleven months after date, we, Harris Brantly Peyton, S. Graves and Hugh Ferguson, jointly and severally, promise to pay Andrew Armstrong, cashier, or bearer, two thousand dollars, value received, negotiable and payable at the Branch Bank of the state of Alabama, at Mobile.

"Credit, Diego McVoy.

HARRIS BRANTLY,
PEYTON S. GRAVES,
HUGH FERGUSON.

HARRIS BRANTLY,
PEYTON S. GRAVES,
HUGH FERGUSON."

The note had on it the two indorsements of Diego McVoy and William D. Primrose; and that of Taulmin, Hazard & Company was stricken out. On the face of the note there was, in pencil, the figures 169.

The defendants, the three makers, introduced evidence to prove that the note, in its present form (except the indorsements), was sent by one of the makers to McVoy, who was his factor in Mobile, to be offered for discount in the Branch Bank of the State, in that city, as an accommodation note; the proceeds of which were to be forwarded to said makers. That the note was offered for discount and rejected. The factor then proposed to raise money on the note, for his own use, without the knowledge of the makers, and intended to conceal the appropriation of the note from them. The first person to whom he offered to sell the note, deemed the attempt a fraud, and refused to purchase. McVoy then indorsed and transferred the note to Primrose, for $1200, communicating to him, it had been offered for discount at the bank and rejected. Taulmin, Hazard & Company held a note for $3250, on Black, indorsed by Vail & Dade, and by Primrose, and which was past due; to discharge which, in part, Primrose transferred the note in controversy to Taulmin, Hazard & Company; and the latter indorsed the same, before its maturity, to the plaintiff, Fowler, and received credit on their account; they being largely indebted to him at the time.

The leading feature in the cause, involving the principle on which it turns, is this: the note was in the form prescribed by the bank to those who desired accommodations at it; which form was not in use, before its adoption there. The memorandum on the left hand side of the note, and signed by the makers, was designed to show the officers of the bank to whose credit the money was to be placed, *should the note be discounted; and by the usages of the bank, no other person than the one thus named could receive the money. Primrose testified, he knew from the pencil mark on the face of the note, it had been offered for discount and refused, when he purchased it. The cashier proved the pencil mark was made according to the usage of the bank on all notes offered for discount and refused.

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To a part of the first instruction, that held, if the plaintiff took the note in payment of a pre-existing debt, due to him from Taulmin, Hazard & Company, then the jury ought to find for the defendants, exception is taken; and the court refused to instruct the jury, that if the plaintiff took the note fairly, in payment of a debt due to him, before its maturity, without notice of the purpose for which McVoy had held it, then he was entitled to recover. And also refused to instruct, if the jury believed plaintiff took the note *bonâ fide*, in payment of a previous debt, that he

had no notice of any fraud, and there were no circumstances to put him upon an inquiry into any fraud committed on the part of McVoy, he was entitled to recover. There were other instructions asked, and refused; but as they are in effect the same as those recited, an answer to which will cover the whole case, they need not be further noticed.

The known customs of the bank, and its ordinary modes of transacting business, including the prescribed forms of notes offered for discount, were matters of proof, and entered into the contract; and the parties to it must be understood as having governed themselves by such customs and modes of doing business; and this, whether they had actual knowledge of them, or not; and it was especially the duty of all those dealing for the paper in question to ascertain them, if unknown. Such is the established doctrine of this court, as laid down in *Renner* v. *Bank of Columbia*, 9 Wheat. 581; *Mills* v. *Bank of the United States*, 11 Ibid. 431, and *Bank of Washington* v. *Triplett*, 1 Pet. 32–3.

The note sued on is peculiar in its form; it was made for the purposes of discount, and only intended for negotiation at the bank, and not for circulation out of it. The pencil mark on its face, when sold, was common to all rejected paper, and was put there by the officers of the bank, as evidence of the fact that it had been offered and rejected; and those dealing for it, with the mark on its face, must be presumed to have had knowledge what it imported; as the slightest inquiry would have ascertained its meaning. These were the legal presumptions attached to the contract, when the plaintiff purchased it; and the explanatory evidence to prove the customs of the bank, was introduced to enlighten the court and jury in regard to the rules governing the transaction, and furnishing the law of the case; and which the plaintiff, when he purchased the paper, is presumed to have known and understood; as the court knew and understood it, after it was proved on the trial.

This was the case, made up of law and fact, on which the court [*321
*was asked to charge the jury; and not the abstract proposition, whether, on a proper construction of the statutes of Alabama, negotiable paper, payable in bank, purchased *bonâ fide*, and without notice of an existing infirmity, but taken in discharge of a pre-existing debt, carried the infirmity with it into the hands of the purchaser; for the reason, that the mode of payment was not in the usual course of trade. A note over-due, or bill dishonored, is a circumstance of suspicion, to put those dealing for it afterwards on their guard; and in whose hands it is open to the same defences it was in the hands of the holder when it fell due. 13 Pet. 79. After maturity, such paper cannot be negotiable "in the due course of trade;" although still assignable. So, the paper before us carried on its face circumstances of suspicion, so palpable as to put those dealing for it, before maturity, on their guard; and as to require at their hands strict inquiry into the title of those through whose hands it had passed. Failing to be thus diligent, they must abide by the misfortune their negligence imposed, and stand in the condition of McVoy. As between him and the defendants, there was no contract or liability on their part; nor as bearer of the note, could he lawfully pass it off in the due course of trade, so as to communicate a better title to another; the face of the paper betraying its character and purposes, and McVoy's want of authority.

All the rulings of the court below must be referred to this paper, and to the special case made by the proofs. Any instruction asked, which cannot be given to the whole extent asked, may be simply refused ; or it may be modified, at the discretion of the court. No instruction was asked, that could have been lawfully given ; to every one, the court could well say, and did in substance say, that under no circumstances could a purchase of this note be made by the plaintiff, from Taulmin, Hazard & Company, so as to exempt it in the hands of the assignee, from the infirmity it was subject to in the hands of McVoy. And in regard to the last part of the first instruction, where the jury is in substance told, that if they believed the note was taken in payment of a pre-existing debt, due to plaintiff, from Taulmin, Hazard & Company, still they should find for the defendants : the court might have gone further, and instructed the jury, that neither could the plaintiff recover had the note been purchased *bonâ fide*, and without notice of the fraudulent conduct of McVoy. The judgment is, therefore, ordered to be affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the southern district of Alabama, and was argued by counsel : On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*322] *John F. Games and Nathan Gilbert, Plaintiffs in error, *v.* John Stiles, *ex dem.* Walter Dunn, deceased, Defendant in error.

Execution of deed.—Charge on matters of fact.—Names.—Sale for taxes.—Ejectment.

A deed was executed in Glasgow, Scotland, by which land in Ohio, which had been patented to David Buchanan, by the United States, was conveyed to Walter Sterling; the deed recited, that it was made in pursuance of a decree of the circuit court of the United States for the district of Virginia ; no exemplification of the decree was offered in evidence in support of the deed : The court *held*, that as Buchanan was the patentee of the land, although he made the deed in pursuance of the decree of the circuit court of Virginia, the decree could add nothing to the validity of the conveyance ; and therefore, it was wholly unnecessary to prove the decree ; the deed was good without the decree.

The possession of a deed, regularly executed, is *primâ facie* evidence of its delivery ; under ordinary circumstances, no other evidence of the delivery of a deed than the possession of it, by the person claiming under it, is required.[1]

The grantor in the deed was David Carrick Buchanan ; and he declared in it, that he was the same person who was formerly David Buchanan. The cicuit court were required to charge the jury, that it was necessary to convince the jury, by proofs in court, that David Carrick Buchanan was the same person as the grantor named in the patent, David Buchanan ; and that the statement by the grantor was no proof to establish the fact ; the circuit court instructed the jury, that they must be satisfied from the deed and other documents, and the circumstances of the case, that the grantor in the deed was the same person to whom the patent was issued ; and they declared their opinion that such was the fact. The principle is well estab-

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[1] Flagg *v.* Mann, 2 Sumn. 489 ; Rhine *v.* Robinson, 27 Penn. St. 30 ; Story *v.* Bishop, 4 E. D. Sm. 423 ; Carnes *v.* Platt, 9 J. & Sp. 435. So, the recording of a deed, in the absence of opposing evidence, justifies a presumption of delivery. Younge *v.* Guilbeau, 3 Wall. 636 ; Ten Eyck *v.* Perkins, 2 Wend. 308 ; Rigler *v.* Cloud, 14 Penn. St. 361 ; Kille *v.* Ege, 79 Id. 15.